Office-Supreme Court, U.S.
FILED
FEB 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-954

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE V. KECKEISEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that their failure to inform their employer of their violations of the company's conflict of interest policy could not form the predicate for mail fraud under 18 U.S.C. 1341. They also claim that their mail fraud convictions are impermissibly inconsistent with their acquittal on several Elkins Act (49 U.S.C. 41(1)) counts.

1. After a bench trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on 12 counts of mail fraud (18 U.S.C. 1341) and one court of conspiracy to commit those offenses (18 U.S.C. 371 and 1341).[1] Petitioner Keckeisen was sentenced to five

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[1]They were acquitted on eight counts charging violations of the Elkins Act, 49 U.S.C. 41(1). Co-defendant Biagio Robert Pinto stood trial with petitioners, and the district court entered the same judgment against him. His conviction was affirmed on appeal, and this Court denied certiorari. *Pinto* v. *United States*, No. 82-899 (Jan. 10, 1983).

years' imprisonment and petitioners Pfeffer and Buchanan were sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A1-A9).

a. The evidence at trial, which is set out in the opinion of the district court (Pet. App. A13-A25), showed that petitioners, who were freight managers for American Airlines,[2] conspired with co-defendant Biagio Robert Pinto to give Pinto's trucking business preferential treatment in the awarding of contracts to transport freight between American Airlines' terminals. As a result of the conspiracy, American Airlines was deprived of the opportunity to secure a freight carrier that provided either a better quality of service or a lower price for its contracts (*id.* at A19).

Contract awards for trucking services between American Airlines' offices—known as "HUB" services—are made largely upon the recommendation of each office's local freight manager (Pet. App. A14). Between 1966 and January 1978, Pinto paid bribes and kickbacks, often through intermediaries, to petitioners.[3] In return, petitioners saw to it that Pinto's trucking company was given preferential treatment in the awarding of HUB contracts (*id.* at A16-A17).[4] In addition, petitioners Keckeisen and Buchanan

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[2]Petitioner Keckeisen became manager of freight services for American Airlines in Philadelphia in 1971. In 1976, he was transferred to New York to manage freight services at Kennedy Airport (Pet. App. A15). Petitioner Pfeffer managed freight services in Philadelphia from 1966 to 1971, when he was transferred to an administrative post in New York. In 1974, he moved on to Chicago's O'Hare Airport to manage its freight services for American Airlines (*ibid.*). Petitioner Buchanan served under both men in Philadelphia from 1966 to August 1976, when he succeeded Keckeisen as manager of freight services in Philadelphia (*ibid.*).

[3]In addition to cash payments, in 1974 Pinto gave petitioner Keckeisen an automobile (Pet. App. A16).

[4]Pinto had exclusive rights to the Philadelphia HUB route from at least 1966 until some point in 1981 (Pet. App. A18). Within two months of his transfer to Chicago in 1974, Pfeffer secured the Chicago to

provided Pinto with international freight services at the American Airlines Philadelphia freight department "at a rate substantially less than that charged other customers" (*id.* at A22).

Although petitioners knew of a company policy forbidding employees or their family members from receiving money or gifts from suppliers of services to the company, petitioners failed to report to American Airlines that Pinto paid them substantial sums of money (Pet. App. A16-A18). Moreover, when Keckeisen received an anonymous letter in November 1972 alleging that Pinto was paying money to Buchanan's wife, Keckeisen merely conducted a brief, inconclusive investigation (*id.* at A24-A25).

b. After considering the evidence at trial, the district court entered extensive findings of fact and conclusions of law (Pet. App. A10-A32). The trial court determined that petitioners and Pinto conspired to defraud American Airlines and used the mails in furtherance of the scheme. Accordingly, it convicted petitioners and Pinto on the mail fraud counts (*id.* at A25-A28). The court acquitted petitioners and Pinto on the Elkins Act charges, however, because there was no evidence of deviation from Pinto's published tariff rates (*id.* at A28-A29). The court of appeals affirmed by judgment order (*id.* at A1-A9).

Indianapolis HUB route for Pinto. Pfeffer stated in his written recommendation that Pinto would charge less than the existing carrier (*id.* at A19-A20). In reality, however, Pinto charged American Airlines more than the predecessor carrier and otherwise violated the terms of his contract (*id.* at A20-A21). In 1977, Keckeisen unsuccessfully attempted to obtain the New York-Syracuse HUB route for Pinto. Keckeisen claimed that Pinto would charge a lower rate than the existing carrier and that the latter's service had proven to be unreliable (*id.* at A23). Despite an American Airlines' investigation that refuted both points, Keckeisen adhered to his claims (*ibid.*).

2. Petitioners contend (Pet. 10-16) that the mail fraud statute, 18 U.S.C. 1341, does not reach their conduct because they did nothing more than violate American Airlines' conflict of interest policy. This contention is without merit.

The courts of appeals have uniformly held that the mail fraud statute extends to breaches of fiduciary duty like that involved in this case, and this Court has consistently declined to review those decisions.[5] In such situations, the offense is established if the government proves that the defendant failed to disclose material information when he was under a duty to do so, and that he used the mails to execute his fraudulent scheme. *United States* v. *Barta*, 635 F.2d 999, 1005-1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981).

Under these principles, there was abundant proof of petitioners' guilt. Each petitioner had a fiduciary obligation to provide undivided loyalty to his employer, American Airlines, and to advise American of any personal interest that was adverse to the company's. Moreover, petitioners well knew that they had an affirmative duty not to receive money

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[5]See *United States* v. *Bronston*, 658 F.2d 920, 926-928 (2d Cir. 1981), cert. denied, No. 81-1441 (Apr. 5, 1982); *United States* v. *Barta*, 635 F.2d 999, 1005-1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F.2d 1167, 1170-1173 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Mandel*, 591 F.2d 1347, 1361-1364, vacated on other grounds, 602 F.2d 653 (4th Cir. 1979), (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Bush*, 522 F.2d 641, 646-648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Bryza*, 522 F.2d 414, 421-423 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *Isaacs*, 493 F.2d 1124, 1149-1150 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *States*, 488 F.2d 761, 764-766 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *United States* v. *George*, 477 F.2d 508, 512-514 (7th Cir.), cert. denied, 414 U.S. 827 (1973).

from Pinto, who provided services to American. Despite these obligations, petitioners never revealed to American that they and members of their families received payments and other gratuities from Pinto.[6] Not only did petitioners fail to disclose material facts, but their scheme was designed and was likely to cause harm to their employer. As the district court found (Pet. App. A19), because of petitioners' efforts, American was prevented from seeking out other freight carriers that charged less for their contracts and provided better services.[7] The court of appeals therefore properly affirmed petitioners' convictions on the mail fraud counts (*id.* at A1-A9).

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[6]Petitioners' reliance (Pet. 10-12) on *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), accordingly is misplaced. In that case, a state legislator was absolved of mail fraud charges arising from his assistance in gaining state contracts for an architectural firm. He received a 10% commission on the work he secured for the firm, but his position as a legislator did not impose upon him any affirmative duty to disclose his interest in the transactions. Here, by contrast, petitioners had a duty not to receive gratuities and to inform their employer of any breaches of that obligation, a duty that they concede they violated (Pet. 12). In *United States* v. *Barta*, *supra*, 635 F.2d at 1007, on which petitioners also rely (Pet. 12), the Second Circuit found a similar reporting duty in the defendant's employment relationship. The court accordingly reinstated the charges against Barta, which had been dismissed by the district court on a theory similar to that espoused by petitioners.

[7]The award to Pinto of the Chicago to Indianapolis HUB route clearly cost American more money than the predecessor carrier charged (Pet. App. A20-A21). American also lost money on its provision of international freight services to Pinto in Philadelphia (*id.* at A21-A22). Finally, the personal payments made by Pinto to petitioners in order to secure the American Airlines contracts are at least a partial measure of the loss suffered by American, since Pinto's firm would presumably have been willing to lower its charges by at least that much had it been able to secure the business by legitimate means not involving such payments.

3. Petitioners also argue (Pet. 16-18) that their acquittal on the Elkins Act charges is inconsistent with their mail fraud convictions, and hence their mail fraud convictions cannot stand. Petitioners, however, did not raise this claim in the court below (Pet. App. A1-A9) and thus may not raise it for the first time in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, there is no merit to petitioners' claim, for there simply is no inconsistency between the verdicts on the two different sets of charges. The district court found (Pet. App. A29) that the government had failed to show that Pinto's trucking company had deviated from its published tariff rates, a requirement for an Elkins Act violation. See *United States* v. *Braverman*, 373 U.S. 405 (1963). Pinto's payments to petitioners were not tied to his published tariff rates, and therefore did not constitute rebates under the Elkins Act. But, while the payments may not have run afoul of the Elkins Act, they clearly were bribes designed to ensure that Pinto would continue to receive contracts from American. Thus, there is no inconsistency in the district court's findings in this case, and further review of this essentially fact-bound issue is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02